

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	
)	
In The Matter Of Amendment Of Parts Of)	ET Docket No. 98-206
The Commission's Rules To Permit Operation)	
Of NGSO FSS Systems Co-Frequency With)	
GSO And Terrestrial Systems In The Ku Band)	
Frequency Range)	
)	
To: The Commission)	

**COMMENTS OF
THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE**

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SUMMARY

The fierce debate surrounding the current proceeding suggests the potential which this spectrum may offer to Multichannel Video and Data Distribution Service (“MVDDS”) licensees, as well as to the countless consumers they may serve – especially those located in rural areas. For that reason, NRTC urges the Commission to establish clear guidelines and principles that will ensure fair and just treatment with regard to the allocation of this valuable 12.2 – 12.7 GHz spectrum.

No applicants should be authorized to provide MVDDS services in this band without first granting all interested parties a full, fair and open opportunity to submit competing applications. By establishing a clear and unmistakable Filing Window, accepting competing applications and conducting an auction, the Commission will ensure that all applicants have an opportunity to participate in and pay for the use of this valuable spectrum.

NRTC’s Comments address arguments raised by Diversified Communications Engineering, Inc. (affiliated with Northpoint Communications, and hereinafter referred to as “Northpoint”) in its efforts to secure this spectrum for its sole use without benefit of competition by other would-be applicants. First, Northpoint is entirely mistaken in its assertion that it filed the only ‘valid’ application with the Commission. Because the Commission never opened any Filing Window or established any formal application process for this type of service in this band, Northpoint is entitled to no special equities as a result of filing its application “first.” Other, later-filed applications – and applications not yet filed – are entitled to every bit as much consideration as Northpoint’s.

Second, despite Northpoint’s arguments that auctions for *international* satellite applications are somehow improper, the Commission is required – by statute – to initiate an auction if mutual exclusivity exists with regard to *domestic* satellite applications. Accordingly, a proper Filing Window should be established so that mutual exclusivity may be established by applicants interested in providing the newly created MVDDS service in the 12.2 – 12.7 GHz band.

Third, despite Northpoint’s claim that the spectrum cannot be auctioned due to its international classification, the Commission should recognize that the technology being proposed by Northpoint and others is proposed for use on a domestic, terrestrial basis. Satellite prohibitions do not apply; the spectrum should be subject to auction in the event of mutual exclusivity.

Finally, Northpoint has implied that because it developed this technology it is entitled to some form of special treatment in the nature of a “Pioneer’s Preference.” Not only has the Commission banned the utilization of such a program in assignment of spectrum, their use by the Commission is now specifically prohibited by law.

The Commission should ensure that all entities are provided with a full, fair and open opportunity to submit competing applications. By establishing an unequivocal Filing Window, accepting competing applications and conducting an auction, the Commission will guarantee that all applicants have an opportunity to participate in and pay for the use of this valuable spectrum.

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Comments Of The National Rural Telecommunications Cooperative

1. The National Rural Telecommunications Cooperative ("NRTC") is pleased to submit these Comments responsive to the Commission's Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned proceeding.¹ NRTC urges the Commission to open a Filing Window, accept competing applications and hold an auction before authorizing licensees to provide terrestrial Multichannel Video and Data Distribution Services ("MVDDS") in the 12.2-12.7 GHz band currently used by Direct Broadcast Satellite ("DBS") licensees to serve more than 13 million subscribers.²

¹ See, *In the Matter of Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide A Fixed Service in the 12.2-12.7 GHz Band*, ET Docket No. 98-206, RM-9147, RM-9245; FCC 00-418, Federal Register, Volume 66, Number 16, pgs. 7607-7613, (Released January 24, 2001) ("the Northpoint Order").

² See, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, FCC 01-1, at ¶ 8 (Released January 8, 2001).

2. As evidenced by the number of terrestrial applications filed to date (even though the Commission has not yet established an application filing window for terrestrial applications in this band), this spectrum apparently offers great potential for terrestrial services. NRTC urges the Commission to grant no regular terrestrial operating privileges for this band, however, without first opening a Filing Window, receiving applications from all interested parties, and, if necessary, conducting a spectrum auction to award licenses.

3. In addition to promoting new technologies and ensuring the efficient use of scarce and valuable spectrum, a Filing Window coupled with spectrum auctions would ensure a full and fair opportunity for all interested parties to participate in this revolutionary development. It would be patently unfair and contrary to the public interest for the Commission to award regular licenses at this stage of the proceeding without first formally opening an unambiguous Filing Window, accepting competing applications and conducting competitive bidding.

I. BACKGROUND.

4. NRTC is a non-profit cooperative association comprised of 682 rural electric cooperatives, 122 rural telephone cooperatives and 183 small independent telephone companies located throughout 48 states. NRTC's mission is to meet the telecommunications needs of American consumers living in rural areas. In furtherance of that mission, NRTC paid more than \$100,000,000 to DIRECTV in 1992 to capitalize the launch of the DIRECTV satellite business in 1994. In return, through a DBS Distribution Agreement between NRTC and Hughes Communications Galaxy, Inc. (DIRECTV's predecessor-in-interest), NRTC received program distribution and other rights to market

and distribute DIRECTV programming services throughout large portions of rural America. NRTC, its members and affiliates currently market and distribute DIRECTV programming to more than 1,700,000 rural households using DBS technology in the 12.2-12.7 GHz band.³

A. Northpoint and Related Applications.

5. On January 8, 1998, Diversified Communications Engineering, Inc. (affiliated with Northpoint Communications, and hereinafter referred to as “Northpoint”) filed an application for modification of Experimental Radio license for Station WA2XMY.⁴ This station was previously granted an Experimental Radio license for a transmitting antenna at King Ranch, Texas. By the modification application, Northpoint sought to add an additional transmitting antenna at Austin, Texas. Through its experimentation, Northpoint was seeking to determine whether simultaneous co-channel terrestrial signals could be transmitted on frequencies in the 12.2-12.7 GHz band without causing harmful interference to DBS receivers.

6. On March 6, 1998, Northpoint filed a Petition for Rulemaking with the Commission aimed at providing terrestrial retransmission of local television signals and one-way data services to DBS receivers in the 12.2-12.7 GHz band on a secondary basis to Broadcast Satellite Service (“BSS”) operations. Northpoint stated that its proposal would allow DBS subscribers to receive local television programming and one-way data services with minimal additional equipment, thereby permitting the DBS service to compete more fully with cable television services. The Petition for Rulemaking was

³ See, National Rural Telecommunications Web-Site <<http://www.nrtc.org/navigate.cfm?page=DIRECTV>> referencing current number of rural customers served through the NRTC/DirecTV relationship (visited 2/13/2001).

⁴ See File No. 6001-EX-MR-1998.

submitted at the same time that Northpoint was conducting various experimental tests with this technology in both Kings Ranch, Texas,⁵ and Washington, D.C.⁶

7. As the Commission is well aware, Northpoint's tests proved to be very controversial due to the possible interference problems between potential terrestrial users and current DBS licensees. The Satellite Communications and Broadcasting Association ("SBCA"), DirecTV and EchoStar have been particularly adamant that the approval of Northpoint's technology would have a disastrous impact on DBS licensees. In June and July of 1999, DirecTV and EchoStar filed Petitions with the Commission seeking the immediate cessation of Northpoint's testing.⁷ Nonetheless, the Commission continued to express a keen interest in exploring the potential benefits of the Northpoint technology.⁸

8. On April 18, 2000, Pegasus Communications ("Pegasus"), a former critic of Northpoint's efforts, filed an application virtually identical to Northpoint's.⁹ Northpoint claims that the Pegasus application is a mere anti-competitive ruse. Additionally, Northpoint has asserted that the Pegasus application is invalid because it was not filed during an alleged filing window.¹⁰

⁵ Diversified Communications Engineering, Inc., *Application For Modification of Experimental Radio License*, File No. 6001-EX-MR-1998 for Station WA2XMY, filed January 8, 1998.

⁶ Diversified Communications Engineering, Inc., *Application for Special Temporary Authority*, File No. 0094-EX-ST-1999, filed March 12, 1999.

⁷ See DirecTV's *Application for Expedited Review and Request for Immediate Suspension of Testing*, filed June 25, 1999, and EchoStar's *Emergency Petition for Cease and Desist Order*, filed July 26, 1999.

⁸ See Public Notice, DA 99-1838, released September 9, 1999 (where the Commission states that Northpoint's proposed experimentation is likely to produce data that will be useful to the Commission in evaluating the sharing potential between terrestrial and DBS services in the 12.2-12.7 GHz band.).

⁹ See Application of Pegasus Communications, April 18, 2000. Pegasus distributes DIRECTV programming through a Member Agreement with NRTC and pursuant to NRTC's DBS Distribution Agreement with DIRECTV.

¹⁰ As discussed below, Northpoint filed its non-NGSO application during a filing window for NGSO applications.

9. To further complicate the matter, Satellite Receivers Ltd. (“SRL”), a longtime C-band equipment retailer and programming packager located in Green Bay, Wisconsin, subsequently submitted yet another application almost identical to that of Northpoint. SRL states that it seeks to deliver a terrestrial service in the Midwest to augment its C-band business and complement DBS systems. As evidenced by the FNPRM, Northpoint argues that the applications of SRL and Pegasus should be dismissed as “late filed,” because they were filed outside of an alleged “application window.”¹¹ However, in fact, the Commission never opened any Filing Window or set any filing deadline to accept Northpoint's application or any other *terrestrial* applications in the DBS band.

10. Rather, the application window to which Northpoint is referring was established during the Rulemaking Proceeding for an entirely different purpose. The Commission set a January 8, 1999 Filing Window for the specific purpose of filing non-geostationary satellite orbit (“NGSO”) applications,¹² not terrestrially-based applications such as Northpoint’s. Eight NGSO Applications were filed during the NGSO Window, none of which offered the type of terrestrial communications proposed by Northpoint.

¹¹ See, The Northpoint Order, at 325 (specifically seeking comment on whether the *FSS NPRM* and the *Ku Band Cut-Off Notice* gave adequate notice to all parties interested in filing applications for terrestrial use of the 12.2-12.7 GHz band. The Commission also asks whether Northpoint’s application should be accepted for filing, and whether it is mutually exclusive with any other applications.).

¹² See, FCC 98-310, *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku- Band Frequency Range*, ET Docket No. 98-206, ¶71; and See, *Cut-off Established for Additional Applications and Letters of Intent in the 12.75-13.25 Ghz, 13.75-14.5 Ghz, 17.3-17.8 Ghz and 10.7-12.7 Ghz Frequency Bands*, Report No. SPB-141, released November 2, 1998.

B. Rural Local TV Legislation.

11. As part of the 1999 Satellite Home Viewer Improvement Act (“SHVIA”) legislation, Congress passed a provision entitled the Rural Local Broadcast Signal Act.¹³ Among other things, the law required the Commission to make a determination by November 29, 2000, regarding licenses or other authorizations for facilities that will utilize – for delivering local broadcast television signals to satellite television subscribers in unserved and underserved local television markets – spectrum otherwise allocated to commercial use.¹⁴ The SHVIA legislation also mandated that the Commission ensure that no facility licensed or authorized to deliver such local broadcast television signals “causes harmful interference to the primary users of that spectrum or to public safety spectrum use.”¹⁵

C. The Report and Order.

12. In response to the Rural Local Broadcast Signal Act, the Commission – on November 29, 2000 – adopted its Report and Order (“R&O”) establishing certain rules, policies and technical standards to allow non-geostationary satellite orbit (“NGSO”) fixed-satellite service (“FSS”) providers (e.g., SkyBridge) to operate in various segments of the Ku-band on a shared, co-primary basis. The Commission anticipates that these technical standards will prevent unacceptable interference and allow for the future growth of incumbent services. Additionally, the R&O concludes that a new terrestrial MVDDS can operate in the 12.2-12.7 GHz band on a non-harmful interference

¹³ See Act of Nov. 29, 1999, Pub. L. 106-113, 113 Stat. 1501, 1537 (enacting S. 1948, Title II of the Intellectual Property and Communications Omnibus Reform Act of 1999 (IPACORA)), to be codified at 47 U.S.C. § 338.

¹⁴ Id. While this provision does not identify the 12.2-12.7 GHz band specifically, Northpoint’s proposed service could be one alternative to satisfy this demand in rural and underserved local television markets.

¹⁵ Id.

basis with incumbent BSS licensees and on a co-primary basis with the NGSO FSS. Concurrent with the R&O, the Commission issued its FNPRM seeking comment on technical and service rules for licensing the MVDDS.

II. THE FURTHER NOTICE OF PROPOSED RULEMAKING.

13. The FCC believes that MVDDS can be used to deliver a wide array of video programming, including local television, and data services in both urban and rural areas. The Commission also views such proposed use of spectrum as “creative” and possibly “fostering spectrum efficiency.”¹⁶

14. Before the MVDDS is fully authorized in the 12.2-12.7 GHz band, however, the Commission proposed specific issues to be addressed in the FNPRM. Most importantly, as NRTC urged in its September 21, 2000 ex parte filing with the Commission, the FCC asks for comment on the status of the various applications filed to date in this proceeding (i.e., Northpoint, Pegasus and SRL). The Commission recognized in the FNPRM that, “none of the subject waiver requests and applications submitted to date have been formally accepted for filing.”¹⁷ Prior to granting any such request, the Commission has stated that it must first determine “how [these applications] should be processed.”¹⁸

15. With regard to the Northpoint applications, the Commission seeks comment on “the merits of Northpoint's arguments that its applications should be accepted for

¹⁶ See, *The Northpoint Order*, at ¶259.

¹⁷ *Id.* at 322.

¹⁸ *Id.*

filing and granted.”¹⁹ Thus, the issues raised in NRTC’s September 21, 2000 ex parte filing (i.e. that a formal filing window was never opened by the Commission) are now formally open for consideration by the Commission.

16. Interestingly, the Commission acknowledges that Northpoint's pending application “differs from our traditional process for establishing new terrestrial wireless services.”²⁰ The Commission notes that when such services are proposed, it generally initiates a rule making proceeding and establishes service rules before accepting applications for filing. The Commission seeks comment on whether this “traditional approach” should be followed with respect to the Northpoint application.²¹

17. With particular focus on the Pegasus and SRL applications, the Commission raises three possibilities:

1. Dismiss the Pegasus and SRL applications as *late* filed;
2. Dismiss the Pegasus and SRL applications as *prematurely* filed and therefore defective; or
3. Limit eligibility to one or more of the applications for terrestrial service received to date.

The Commission further states that it will not consider the question of mutual exclusivity until such time as it determines whether – and how – to process the applications.

18. In addition to issues associated with the status of the applications, the Commission seeks comment on various technical and service issues concerning MVDDS

¹⁹ Id. at 325.

²⁰ Id. at 327.

²¹ Id.

operations in this band. With regard to MVDDS/DBS sharing issues, the Commission has proposed that at least 30 days prior to any MVDDS operations, the MVDDS licensee must: 1) notify any DBS licensee of the location and relevant technical characteristics of their transmitting facility; and 2) certify to the Commission and relevant DBS providers that it has designed its facility to avoid interference. MVDDS providers would also be responsible for mitigating any subsequent interference.

19. With regard to MVDDS/NGSO FSS sharing, the Commission is seeking comment on proposed PFD limits. Additionally, the Commission seeks comment on whether coordination procedures should be established as opposed to the adoption of EPFD limits.

III. NRTC COMMENTS

A. The Commission Should Open a Filing Window, Accept Competing Applications and Hold an Auction.

20. NRTC's *ex parte* filing in this proceeding on September 21, 2000, addressed in detail many of the licensing and application processing issues raised in the FNPRM. Specifically, NRTC pointed out that if the Commission determines that DBS and terrestrial users can share this band, it should not authorize Northpoint or any other entity to provide services without first providing all entities with a full, fair and open opportunity to submit competing applications. By establishing an unambiguous Filing Window, accepting competing applications and conducting an auction, the Commission will ensure that all applicants have an opportunity to participate in and pay for the use of this valuable spectrum.

21. If viable, Northpoint's proposed technology has broad public interest implications. It could significantly alter the manner in which advanced telecommunications services are provided to the American public. In the event that the Commission determines in the Rulemaking Proceeding to authorize the shared use of operations in the Ku-band between terrestrial and satellite licensees, it is imperative that all interested parties be ensured a full and fair opportunity to participate.

22. NRTC is dedicated to ensuring that rural Americans – a segment often overlooked in the provision of advanced telecommunications services – have access to a full array of advanced telecommunications services. Northpoint-like terrestrial operations in the DBS band may offer significant opportunities to bring new technologies and services to rural and other parts of America. For that reason alone, the Commission should encourage broad participation in the application process, thereby ensuring that this spectrum is developed to its full potential. The nurturing of robust competition will make certain that the Commission best meets its statutory mandate to promote the public interest, convenience and necessity.²²

23. In order to ensure that all interested applicants have a full and fair opportunity to participate in providing these types of services, the Commission must open an unambiguous Filing Window, accept competing applications and engage in a competitive bidding proceeding. Yet Northpoint has consistently denied the legitimacy and necessity of any type of spectrum auction on several grounds. First, Northpoint maintains that there are no other valid competing applications. Second, Northpoint maintains that current federal statutes prohibit the auctioning of satellite spectrum. Finally, Northpoint

²² 47 U.S.C. 151.

has alleged that a Pioneer's Preference would be appropriate in the case at bar.

Northpoint's overall analysis of the situation, however, is seriously flawed based upon the following points.

1. Northpoint is Wholly Incorrect In Asserting That It Has the Only "Valid" Application.

24. First, as addressed previously, Northpoint is wholly incorrect in arguing that Northpoint – and only Northpoint – has submitted a "valid" application. Since no formal application process has ever been established by the Commission for this type of service in this band, Northpoint is entitled to no special equities as a result of filing its application "first." Other, later-filed applicants are presumably entitled to every bit as much consideration as Northpoint.

25. The problem, however, is that the Commission has never formally invited *any* – let alone *all* – interested parties to file applications. There has never been a clear, unambiguous Filing Window for the MVDDS. (Indeed, the applications were submitted even before the Commission coined the term "MVDDS"). As a result, applications have been submitted on a piecemeal basis due to the uncertainty of the regulatory status of the filing procedure. Fundamental fairness and due process requires that the Commission establish an open and unambiguous Filing Window so that *all* applications can be processed in an even-handed manner, without prejudice or partiality.

2. The Commission Is Required To Initiate An Auction In The Event Of Mutual Exclusivity Regarding Domestic Applications.

26. Second, although Northpoint is correct in asserting that there is a prohibition on auctions for *international* satellite applications,²³ the Commission is *required* to

²³ Communications Satellite Act of 1962, §647.

initiate an auction in the event of mutual exclusivity regarding domestic applications.²⁴ This distinction is important, because the terrestrial applications in question clearly do not rise to the level of “international satellite applications.” Further, at a minimum, it is fair to say that uncertainty exists as to the status of “mutual exclusivity” vis a vis the Northpoint, Pegasus and SRL applications.

27. Thus, the domestic nature of the terrestrial applications in question, as well as the apparent mutually exclusivity involving current and would-be applicants, clearly compels the Commission to announce an unambiguous filing procedure and conduct an auction in accordance with long-standing Commission rules.²⁵ In fairness, a Filing Window should be opened to all interested applicants so that mutual exclusivity may be clearly established by any applicant interested in providing the newly created MVDDS services in the DBS band.

3. The Spectrum at Issue Should Be Considered Terrestrial – Not Satellite – Spectrum.

28. The spectrum at issue in this proceeding is terrestrial in nature and – despite Northpoint’s arguments regarding the proper regulatory treatment of *satellite* spectrum – should be treated as such. Northpoint’s contention that the spectrum cannot be auctioned because it is international satellite spectrum is quite simply a hollow argument based upon a faulty premise. The technology being proposed by Northpoint, Pegasus and SRL is entirely *terrestrial* in nature. Whereas the 12.2-12.7 GHz spectrum is generally used for downlink in satellite operations, none of the applications currently submitted propose such a use.

²⁴ 47 U.S.C. 309(j).

²⁵ 47 U.S.C. 309(j).

29. Instead, each of the current applications proposes a terrestrial based point-to-point or point-to-multi-point technology. As such, Northpoint's contention that the spectrum should be considered international satellite spectrum falls flat. Accordingly, use of the proposed spectrum should be considered strictly domestic and terrestrial in nature and therefore subject to auction in the event of mutual exclusivity.

4. The Commission Has Banned The Use Of Pioneer Preferences In The Assignment Of Spectrum.

30. Finally, Northpoint seems to imply that it has developed this technology and, therefore, it is entitled to some type of special treatment in the nature of a "Pioneer's Preference"²⁶ By auctioning the spectrum, Northpoint argues that the Commission would somehow be discouraging the development of new and innovative technologies and hindering spectrum efficiency. Furthermore, Northpoint maintains that "subjecting" Northpoint to an auction would somehow be inequitable.²⁷ In fact, however, following a grossly unsuccessful experience in administering a Pioneers Preference program the Commission long ago banned the use of Pioneer Preferences in the assignment of spectrum. By law, the Commission cannot engage in their use now.²⁸

31. The auctioning of spectrum has arguably been one of the driving forces behind the recent explosive growth in new telecommunications services. The Commission has long espoused that auction policies promote the efficient use of new

²⁶ See *Ex Parte Submission of Northpoint Technology, Ltd. And BroadwaveUSA*, ET Docket No. 98-206, dated August 29, 2000, at 14 (stating that subjecting Northpoint to a possible auction would somehow punish, not encourage, innovation).

²⁷ *Ex Parte Submission of Northpoint*, August 29, 2000, at 14.

²⁸ 47 U.S.C. §309(j)(13)(F).

technologies. According to the Commission's oft articulated position, auctions are "fast, efficient and fair" and set the stage for robust competition. Additionally, they generate much needed revenues for the U.S. Treasury -- rather than conferring unjustified benefits on private parties without just compensation to the American public. Northpoint's arguments against spectrum auctions are nothing more than a self-serving attempt to maintain its tenuous and unorthodox foothold on valuable spectrum.

32. As the Commission knows, this has been a long, contentious and unprecedented proceeding. The possibility of exceptional and unforeseen implications for the DBS, cable and broadcast industries as well as the American public, are evidence enough for the Commission to tread cautiously. Despite Northpoint's pleadings to the contrary,²⁹ the Commission must proceed in a manner that promotes the broad public interest in all respects. Rather than conferring an unjust benefit upon a single party seeking to "squeeze a square regulatory peg into a round regulatory hole," the Commission must ensure that the public interest benefits of the newly created MVDDS are available to all applicants willing and able to provide them.

IV. CONCLUSION.


33. The Commission should not authorize Northpoint or any other entity to provide terrestrial services in the DBS band without first providing all entities with a full, fair and open opportunity to submit competing applications. By establishing an unambiguous Filing Window, accepting competing applications and conducting an auction, the Commission will ensure that all applicants have an opportunity to participate

²⁹ See *Ex Parte Submission of Northpoint Technology, Ltd.*, ET Docket No. 98-206, filed August 29, 2000 (urging the Commission to grant the pending applications).

in and pay for the use of this valuable spectrum. In that manner, the Commission will best promote the utilization and development of these frequencies throughout the country.

Respectfully Submitted,

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Attached: Certificate of Service

CERTIFICATE OF SERVICE

I, Tammy Hines, do hereby certify that copies of the foregoing **Comments of the National Rural Telecommunications Cooperative** were sent, via electronic filing and First Class Mail (*), this 12th day of March, 2001, to the following:

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